

DW 02-161

MANCHESTER WATER WORKS

Petition for Exemption from Regulation Pursuant to RSA 362:4

Order Approving Settlement Agreement

O R D E R N O . 24,138

March 14, 2003

APPEARANCES: McLane, Graf, Raulerson & Middleton, P.A. by Sarah B. Knowlton, Esq. for Manchester Water Works; Orr & Reno, P.A. by Douglas L. Patch, Esq. for Pennichuck Water Works, Inc.; Office of Consumer Advocate by F. Anne Ross, Esq. on behalf of residential ratepayers; and Donald M. Kreis, Esq. of the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

On August 30, 2002, Manchester Water Works (MWW) filed a petition with the New Hampshire Public Utilities Commission (Commission) seeking exemption from regulation as a public utility pursuant to RSA 362:4. Specifically, MWW invoked RSA 362:4, III-a, which provides that a municipal corporation furnishing water services to customers outside the municipal boundaries may be exempted from Commission regulation in certain circumstances that concern the rates charged to such customers.

The petition averred that MWW is a municipal water utility serving the City of Manchester and that MWW is also franchised by the Commission to serve customers outside the municipality in the towns of Auburn, Bedford, Goffstown, Hooksett and Londonderry. The petition further noted that MWW

has wholesale contracts to provide water to the Town of Derry, the Grasmere Village Water Precinct, the Central Hooksett Water Precinct and one public utility, Pennichuck Water Works, Inc. (Pennichuck).

According to the petition, individual customers located outside of Manchester are presently charged rates that are approximately 12 percent greater than those charged to customers within Manchester. The petition noted that only two rates involve a differential of more than 15 percent when comparing Manchester customers to others: the rate applicable to senior citizens and the rate charged for usage in excess of 600 ccf of water per quarter.

The Commission entered an Order of Notice on September 27, 2002, establishing deadlines for intervention petitions and scheduling a pre-hearing conference. The Town of Londonderry and Pennichuck submitted intervention petitions. The pre-hearing conference took place as scheduled on November 6, 2002, at which time the pending intervention requests were granted. Following the Pre-Hearing Conference, the parties and Commission Staff (Staff) conducted a technical session and agreed upon a proposed procedural schedule to govern the remainder of the docket. The Commission approved the proposed procedural schedule by secretarial letter on November 20, 2002.

Thereafter, the parties and Staff conducted discovery and settlement negotiations. On January 14, 2003, the Town of Bedford submitted a letter indicating that it did not object to the granting of the MWW petition. On February 11, 2003, MWW filed a Settlement Agreement entered into among MWW, Pennichuck, the Office of Consumer Advocate (OCA) and Staff. At the request of these parties and Staff, and without objection from any other party, the Commission advanced the scheduled merits hearing in this docket to February 19, 2003, rather than conducting it on the previously scheduled dates in March 2003. Although the Town of Londonderry did not appear at the February 19 hearing, it submitted a letter on that date requesting that the Commission attach an annual tariff filing requirement to the Settlement Agreement as a condition of its approval.

II. POSITIONS OF THE PARTIES AND STAFF

A. Settlement Agreement

The proposed Settlement Agreement provides that MWW would be exempt from regulation by the Commission as a public utility with respect to its rates and charges applicable outside the City of Manchester. This exemption would apply as long as these rates and charges are no higher than 15 percent above those charged to MWW's retail customers within Manchester.

The Settlement Agreement provides for an additional exemption from Commission rate regulation. This exemption would apply to water in excess of 600 ccf per quarter, provided to customers outside Manchester. It would be effective as long as the rate applicable to non-Manchester customers were no higher than 43.1 percent higher than the rate applicable within Manchester.

As a condition of providing this exemption under the Settlement Agreement, MWW agreed that it would petition the Commission with respect to any rates that would exceed the above-referenced rate differentials. Such petition would seek either the Commission's approval of the rate increase or a further exemption from Commission rate regulation.

MWW further agreed that it would provide the same percentage discount to all income-eligible customers 65 years of age or older, regardless of whether they reside within or outside of Manchester. The non-Manchester senior citizens in this category would have to meet the same eligibility criteria that have been applicable to customers within Manchester.¹ The Settlement Agreement provides that, as to customers outside of Manchester, eligibility shall be determined by the tax collector

¹ Currently, senior citizens within Manchester are eligible for the discount if the city's tax assessor certifies that they are qualified for Manchester's real estate property tax discount pursuant to RSA 72:39-a and 39-b.

in the customer's municipality or by application directly to MWW.

MWW agreed to work with the applicable municipal tax departments in an effort to implement this senior citizen discount program within six months. MWW further agreed that if the rate discount program cannot be fully implemented by then, it will provide all eligible non-Manchester customers with a credit back to the date that is six months from the date on which the Commission approves the Settlement Agreement. MWW committed to including a written notice of the availability of the rate discount to all non-Manchester customers within three months of the Commission's approval. Finally, MWW agreed to provide a status report to the Commission within six months fully describing its implementation of the senior citizen discount program outside Manchester.

The Settlement Agreement contains certain provisions that concern the Merrimack Source Development Charge (MSDC). The MSDC is "a one-time charge assessed to new customers in franchise areas acquired since May 1, 1987, to fund the cost of constructing facilities necessary to develop the Merrimack River as a source of water supply". *Manchester Water Works*, 76 NH PUC 327, 327 (1991). In the Settlement Agreement, MWW agreed to use all current and future MSDC funds solely for the Merrimack

Source Development Project and for no other purpose. MWW further agreed that it would use reasonable commercial judgment to dispose of, through sale or exchange, any property acquired for purposes of the Merrimack Source Development Project but no longer needed for such purposes, with all proceeds or property from such transactions to be credited to the MSDC account. Additionally, MWW agreed that if it does not develop a supplemental source of water supply by February 3, 2018, it will file a comprehensive report with the Commission explaining the progress and plans with respect to the supplemental supply. At that time, the Commission would be authorized to order any unexpended MSDC funds paid by non-Manchester customers to be returned with interest. The Commission would also be authorized to order any disposition of such funds that the Commission deems to be in the public interest.

The Settlement Agreement provides that MWW would continue to be subject to the franchise application requirements of RSA 374. It would further require MWW to continue to provide water service to those areas for which it has been, or subsequently will be, granted a franchise by the Commission. MWW agreed that it would not withdraw from any franchise territory without the approval of the Commission.

The final provisions of the Settlement Agreement concern MWW's wholesale contracts. MWW agreed to charge the same rates for equivalent sales to all wholesale customers, regardless of whether the customer is a governmental or private entity. Further, MWW and Pennichuck agreed to execute an amended version of their wholesale water contract. The amended version of the contract is appended to the Settlement Agreement. Beyond certain changes that are in the nature of clarifications (such as revising the contract to reflect that Pennichuck is the successor to Consumers New Hampshire Water Company), the amended contract would (1) provide that the rate charged by MWW to Pennichuck will be adjusted each time MWW establishes a new permanent rate for its non-Manchester retail customers, with the rate adjustment imposed on Pennichuck equal in percentage terms to that applicable to a retail industrial customer using 2.1 million gallons per day, (2) require MWW to provide Pennichuck with 90 days' written notice of any proposed change to the MSDC rate applicable to Pennichuck, in which instance Pennichuck would have the option of purchasing any or all of its remaining allotment of 2.1 million gallons per day at the current rate of \$1.14 per gallon, (3) require MWW and Pennichuck to meet to discuss renewal at least three years in advance of the contract's termination date, (4) extend the term of the contract

an additional six years beyond the 25 year term originally contemplated, (5) specify that as long as Pennichuck remains a public utility, any non-agreement as to renewal terms will be submitted to the Commission, which "may act as a mediator in an effort to have the parties reach an agreement," and (6) provides that any disputes arising under the contract shall be submitted to the Commission.

B. Town of Londonderry

No party appeared at the hearing to contest the approval of the Settlement Agreement. However, on the date of the hearing, the Town of Londonderry submitted a letter requesting that the Commission order an additional condition to the Settlement Agreement. Specifically, the Town of Londonderry requested that the Commission require MWW to submit a copy of its tariff each year to both the Commission and to all towns outside of Manchester in which MWW has customers. According to the Town of Londonderry, this would permit the Commission and the affected communities to determine whether MWW is continuing to meet the requirements of RSA 362:4. Without such a condition, according to the Town, no one will be performing a "watch dog function" so as to assure that customers in Londonderry (and presumably other affected towns) are not paying

a rate higher than 15 percent above those charged to Manchester customers.

III. COMMISSION ANALYSIS

RSA 362:4 provides that a municipal corporation furnishing water services shall not be considered a public utility for purposes of the Commission's enabling statutes in two specific circumstances. The first is when the municipal corporation charges new customers outside its municipal boundaries a rate no higher than 15 percent above the rate charged to the corporation's municipal customers. RSA 362:4, III-a(a)(1) (also requiring water of comparable quantity and quality to be provided regardless of location within or outside of municipality, and noting that franchise application provisions of RSA 374 remain applicable). The second circumstance involves the supply of bulk water pursuant to a wholesale rate or contract to another municipality, village district or water precinct. RSA 362:4, III-a(a)(2) (excepting contracts effective before July 23, 1989 and renewals of such contracts).

RSA 362:4, III-a further vests the Commission with authority to exempt a municipal corporation from regulation

(except for franchise application requirements) in certain instances. Specifically,

[t]he commission may exempt a municipal corporation from any and all provisions of [title 34, the Commission's enabling statutes,] except the franchise application requirements of RSA 374, and may authorize a municipal corporation to charge new and existing customers outside its municipal boundaries a rate higher than 15 percent above that charged to its municipal customers, if after notice and hearing, the commission finds such exemption and authorization to be consistent with the public good.

RSA 362:4, III-a(b). And, additionally,

[a] municipal corporation serving customers outside its municipal boundaries and charging a rate no higher than 15 percent above that charged to its municipal customers prior to July 1, 2002, may also be exempted from regulation as a public utility, except for the franchise application requirements of RSA 374, if after notice and hearing, the commission finds such exemption and authorization to be consistent with the public good.

RSA 362:4, III-a(d).

In other words, exemption from rate regulation is automatic when the municipal corporation keeps any water rate differential (as between customers within the municipality and customers taking service elsewhere) at 15 percent or lower for new, as opposed to existing, customers. For all other situations in which there is a differential based on whether the customer is taking service outside the municipal boundaries, exemption is discretionary, based upon a Commission

determination of public good after notice and hearing.

Upon a careful review of the record, it is our determination that the exemption requested by MWW as set forth in the Settlement Agreement is consistent with the public good. With regard to most customers, there is presently a 12 percent rate differential. Allowing that differential to rise by up to three additional percentage points would have a relatively low impact on affected customers and is justified by the overall purpose of RSA 362:4, which is to encourage entities such as MWW to serve areas outside their municipal boundaries.

Moreover, we note that MWW has an excellent compliance record during the period in which it has been subject to regulatory oversight by the Commission. Customer complaints are rare. We thus have confidence in MWW's ability to provide safe and reliable service, charging just and reasonable rates, to customers outside of Manchester even in the absence of traditional regulation by the Commission.

The prospect of rate differentials, in and of themselves, does not suggest that a regulatory exemption is unwise in light of the need to protect customers outside of Manchester. It is our understanding that the existence of the rate differential is related to actual additional costs incurred by MWW in serving customers outside the boundaries of the

municipality.

Finally, we note the explicit acknowledgement in MWW's initial petition that its request for exemption from rate regulation is driven by plans for a \$36 million upgrade to its existing water treatment facility. MWW stated that, if it remains subject to Commission rate regulation, it would be unable to recover the costs of the project during its construction phase from its non-Manchester customers because of RSA 378:30-a (precluding public utility rates from being based on the cost of construction work in progress). Thus, in order to finance the project, it concludes only its customers within Manchester's borders would bear the costs during the construction phase.

Under the MWW proposal as conditioned by the Settlement Agreement, the only customers facing a differential of more than 15 percent would be those taking in excess of 600 ccf (i.e., 60,000 cubic feet) of water per quarter. As noted at hearing, this group consists exclusively of large commercial and/or industrial users, of which MWW has approximately 14. As MWW noted at hearing, the existence of this rate differential is a function of MWW having responded in a previous rate case to the Commission's request that non-Manchester customers receive service under a level rate (as opposed to a declining block rate

applicable to customers within Manchester). The MWW witness further pointed out that, even with a level rate that is subject to the differential requested here, the affected customers would still be receiving service at a cost to them that is less than similar customers elsewhere in New Hampshire must pay. In these circumstances, the requested differential as to these customers is reasonable.

Further, approval of the Settlement Agreement has the salutary effect of making MWW's senior citizen discount available to all income-eligible customers regardless of where they are located. There was little or no justification, beyond administrative convenience, for limiting this program to senior citizens within Manchester. Eligibility for the program is pegged to the criteria established by the City of Manchester under RSA 72:39-b for exempting senior citizens from certain property taxes. This is a reasonable standard to apply to all customers, even those senior citizens living outside Manchester and, thus, to whom different RSA 72:39-b criteria may apply for property tax purposes. The Settlement Agreement contains reasonable provisions for assuring that potentially eligible customers are notified of the program and can qualify for it even in the unlikely event that the tax assessors in the affected municipalities do not undertake the required

certification.

Absence of regulation by this Commission will not mean that MWW will have unfettered discretion with regard to the rates it charges or the quality of water it provides beyond Manchester's boundaries. Testimony at hearing revealed that the Manchester Water Commission will continue to have authority over disputes between MWW and any of its customers, even those outside the city limits. Accordingly, because customers will have another regulatory forum for the redress of complaints against MWW to the extent necessary, we find that granting the requested exemption is consistent with the public interest. In addition, we note that customers stand to benefit from cost reductions associated with the elimination of the annual filings that MWW has heretofore been required to make with this Commission. Ultimately, moreover, if a serious and persistent problem arose with respect to the treatment of customers outside of Manchester, the Commission would have authority to revoke the exemption.

We also note, with approval, that in no instance will MWW apply a rate differential to the Merrimack Source Development Charge, with the entire Merrimack Source Development Project still subject to Commission oversight to the extent described above. We read MWW's commitments in this regard as

indicative of its intent to remain committed to the responsible development of additional water supply capacity to meet the needs of all MWW customers regardless of location, as well as to the responsible use of the resources associated with the project.

It is further appropriate that the instant petition for a regulatory exemption has provided the occasion for a renegotiation of the wholesale contract between MWW and Pennichuck. In essence, the contracting parties have agreed to reset the original 25-year period specified in the contract (which has been in effect for six years) and to maintain the basic provisions of the agreement notwithstanding the deregulation of MWW's retail rates. Inasmuch as the parties have submitted this revised contract for Commission approval as a part of their Settlement Agreement, we need not reach the question of whether exempting a municipal corporation's retail rates from Commission regulation under RSA 362:4 has the effect of divesting the Commission of our authority to approve the municipal corporation's wholesale agreements with customers other than municipalities.

Finally, we agree with and adopt the condition recommended by the Town of Londonderry in its written communication to the Commission. Requiring MWW to furnish us,

and all towns in which MWW has customers, with a copy of its tariff each year will impose no significant additional burden on MWW. It will promote public confidence in MWW's compliance with the terms of the regulatory exemption we grant today, and it will assure a small but significant level of oversight with respect to MWW's tariffs. Accordingly, we will require MWW to make such a filing on March 31 of each year as a condition of the regulatory exemption sought herein.

Based upon the foregoing, it is hereby

ORDERED, that the Settlement Agreement entered into in this docket among Manchester Water Works, Pennichuck Water Works, Inc., the Office of Consumer Advocate and the Staff of the New Hampshire Public Utilities Commission is hereby APPROVED; and it is

FURTHER ORDERED, that Manchester Water Works shall be exempt from rate regulation pursuant to RSA 362:4, III-a to the extent provided for in the Settlement Agreement; and it is

FURTHER ORDERED, that Manchester Water Works shall, on March 31 of each year, file a complete copy of the tariffs applicable to all customers outside of Manchester with a copy of such filing transmitted to the town clerk of each municipality in which Manchester has customers.

By order of the Public Utilities Commission of New
Hampshire this fourteenth day of March, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary